

1 17 counts; three counts of sexual abuse, class 3 felonies
2 (Counts 1, 3, 14), four counts of molestation of a child, class
3 2 felonies (Counts 2, 4, 11, 17), and 10 counts of sexual
4 conduct with a minor, class 2 felonies (Counts 5-10, 12-13,
5 15-16), all dangerous crimes against children. See Answer, Exh.

6 A. The victims of the alleged offenses, which occurred over a
7 period of more than 16 years, were Petitioner's four daughters
8 and two step-daughters.

9 At the conclusion of an eight-day trial, a jury found
10 Petitioner guilty on all counts. The trial court sentenced
11 Petitioner to presumptive terms of five years imprisonment on
12 Counts 1, 3, and 14, to presumptive terms of seventeen years
13 imprisonment on Counts 2, 4, 11, and 17, and to presumptive
14 terms of twenty years imprisonment on Counts 5, 6, 7, 8, 9, 10,
15 12, 13, 15, and 16. Id., Exh. UU & Exh. VV. The trial court
16 ordered that all of the sentences be served consecutively. Id.,
17 Exh. VV.

18 Petitioner took a timely direct appeal of his
19 convictions and sentences. Petitioner argued that the trial
20 court abused its discretion by denying his motion for a directed
21 verdict on Count 11. Id., Exh. WW. On December 11, 2007, the
22 Arizona Court of Appeals affirmed Petitioner's convictions and
23 sentences. Id., Exh. YY. On January 15, 2008, Petitioner
24 filed a petition for review with the Arizona Supreme Court,
25 which denied review on April 1, 2008. Id., Exh. ZZ & Exh. AAA.

26 On June 18, 2008, Petitioner initiated an action for
27 post-conviction relief pursuant to Rule 32, Arizona Rules of
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1 Criminal Procedure. Petitioner alleged: "This petition is based
2 on newly evidence [sic] and possible ineffective assistance at
3 trial and on appeal.... Petitioner has to discuss these issues
4 with court appointed counsel prior to raising the facts of the
5 issues to be raised." Id., Exh. BBB. Petitioner was appointed
6 counsel to represent him in his Rule 32 action. Id., Exh. CCC.
7 On November 12, 2008, counsel filed a notice of completion of
8 post-conviction review, in which she informed the state Superior
9 Court that she was not able to find "colorable claims to raise
10 in a petition for post conviction relief." Id. Exh. DDD. On
11 December 29, 2009, having received no pro per petition and no
12 further request for an extension of the time allowed Petitioner
13 to file a pro per petition, the Superior Court sua sponte
14 dismissed the Rule 32 proceeding. Id., Exh. MMM. Petitioner
15 did not seek review of this decision by the Arizona Court of
16 Appeals.

17 In his federal habeas petition Petitioner contends he
18 is entitled to relief because he was subjected to "a violation
19 of due process in connection with his criminal proceedings, and
20 seeks to reopen his state criminal case." (Ground One)
21 Petitioner also asserts he was denied his Sixth Amendment right
22 to the effective assistance of trial and appellate counsel.
23 (Ground Two) Petitioner also alleges he was denied his right to
24 "a fair trial in violation of due process" and reiterates that
25 he was denied "effective assistance of counsel." (Ground Three)
26 In his fourth claim for relief Petitioner asserts he was denied
27 his right to the effective assistance of counsel "regarding the
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1 issue of his competence based on the failure to appoint an
2 appropriate interpreter for him."

3 Respondents contend that Petitioner's claims are barred
4 by the statute of limitations and that the claims are
5 procedurally barred.

6 **II Analysis**

7 **A. Statute of limitations**

8 The petition seeking a writ of habeas corpus is barred
9 by the applicable statute of limitations found in the
10 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The
11 AEDPA imposed a one-year statute of limitations on state
12 prisoners seeking federal habeas relief from their state
13 convictions. See, e.g., Espinoza Matthews v. California, 432
14 F.3d 1021, 1025 (9th Cir. 2005); Lott v. Mueller, 304 F.3d 918,
15 920 (9th Cir. 2002). The one-year statute of limitations on
16 habeas petitions begins to run on "the date on which the
17 judgment became final by conclusion of direct review or the
18 expiration of the time for seeking such review." 28 U.S.C. §
19 2244(d)(1)(A). The AEDPA provides that a petitioner is entitled
20 to tolling of the statute of limitations during the pendency of
21 a "properly filed application for state post-conviction or other
22 collateral review with respect to the pertinent judgment or
23 claim." 28 U.S.C. § 2244(d)(2); Artuz v. Bennet, 531 U.S. 4, 8,
24 121 S. Ct. 361, 363-64 (2000).

25 Petitioner's conviction became final on or about July
26 1, 2008, when the time expired for seeking certiorari in
27 Petitioner's direct appeal. At that time Petitioner had a

1 pending action for state post-conviction relief which tolled the
2 statute of limitations. The statute of limitations was tolled
3 until the completion of these post-conviction proceedings. On
4 December 29, 2009, the state trial court dismissed Petitioner's
5 Rule 32 action. Petitioner had thirty days to seek review of
6 this decision by the Arizona Court of Appeals. Accordingly, the
7 one-year statute of limitations on Petitioner's federal habeas
8 action began to run on or about January 30, 2010, and expired on
9 or about January 30, 2011. Petitioner's federal habeas action,
10 docketed November 27, 2012, was filed approximately 22 months
11 after the statute of limitations expired.

12 The one-year statute of limitations for filing a habeas
13 petition may be equitably tolled if extraordinary circumstances
14 beyond a prisoner's control prevent the prisoner from filing on
15 time. See Holland v. Florida, 130 S. Ct. 2549, 2554, 2562
16 (2010); Bills v. Clark, 628 F.3d 1092, 1096-97 (9th Cir. 2010).
17 A petitioner seeking equitable tolling must establish two
18 elements: "(1) that he has been pursuing his rights diligently,
19 and (2) that some extraordinary circumstance stood in his way."
20 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814-15
21 (2005). See also Ford v. Gonzalez, 683 F.3d 1230, 1237 (9th
22 Cir.), cert. denied, 133 S. Ct. 769 (2012); Porter v. Ollison,
23 620 F.3d 952, 959 (9th Cir. 2010); Waldron-Ramsey v. Pacholke,
24 556 F.3d 1008, 1011-14 (9th Cir. 2009). In Holland the Supreme
25 Court eschewed a "mechanical rule" for determining extraordinary
26 circumstances, while endorsing a flexible, "case-by-case"
27 approach, drawing "upon decisions made in other similar cases
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1 for guidance." Bills, 628 F.3d at 1096-97.

2 The Ninth Circuit Court of Appeals has determined
3 equitable tolling of the filing deadline for a federal habeas
4 petition is available only if extraordinary circumstances beyond
5 the petitioner's control make it impossible to file a petition
6 on time. See Chaffer v. Prosper, 592 F.3d 1046, 1048-49 (9th
7 Cir. 2010); Porter, 620 F.3d at 959; Waldron-Ramsey, 556 F.3d
8 at 1011-14 & n.4; Harris v. Carter, 515 F.3d 1051, 1054-55 & n.4
9 (9th Cir. 2008). Equitable tolling is only appropriate when
10 external forces, rather than a petitioner's lack of diligence,
11 account for the failure to file a timely habeas action. See
12 Chaffer, 592 F.3d at 1048-49; Waldron-Ramsey, 556 F.3d at 1011;
13 Miles v. Prunty, 187 F.3d 1104, 1107 (9th Cir. 1999). Equitable
14 tolling is also available if the petitioner establishes their
15 actual innocence of the crimes of conviction. See Lee v.
16 Lampert, 653 F.3d 929, 933-34 (9th Cir. 2011).

17 Equitable tolling is to be rarely granted. See, e.g.,
18 Waldron-Ramsey, 556 F.3d at 1011; Jones v. Hulick, 449 F.3d 784,
19 789 (7th Cir. 2006); Stead v. Head, 219 F.2d 1298, 1300 (11th
20 Cir. 2000). Equitable tolling is inappropriate in most cases
21 and "the threshold necessary to trigger equitable tolling [under
22 AEDPA] is very high, lest the exceptions swallow the rule."
23 Miranda v. Castro, 292 F.3d 1063, 1066 (9th Cir. 2002).
24 Petitioner must show that "the extraordinary circumstances were
25 the cause of his untimeliness and that the extraordinary
26 circumstances made it impossible to file a petition on time."
27 Porter, 620 F.3d at 959. It is Petitioner's burden to establish

1 that equitable tolling is warranted in his case. See, e.g.,
2 Porter, 620 F.3d at 959; Espinoza Matthews v. California, 432
3 F.3d 1021, 1026 (9th Cir. 2004); Gaston, 417 F.3d at 1034.

4 Furthermore, most alleged errors by a petitioner's
5 counsel do not per se constitute an "extraordinary circumstance"
6 warranting equitable tolling. See Holland, 130 S. Ct. at 2564;
7 Porter, 620 F.3d at 959-61; Randle v. Crawford, 604 F.3d 1047,
8 1058 (9th Cir.), cert. denied sub nom., Randle v. Skolnik, 131
9 S. Ct. 474 (2010); Ramirez v. Yates, 571 F.3d 993, 998 (9th Cir.
10 2009). It is not sufficient that counsel was negligent; only
11 representation that meets the extraordinary misconduct standard
12 can be a basis for applying equitable tolling. See Porter, 620
13 F.3d at 959. The United States Supreme Court concluded in
14 Holland that federal courts could equitably toll the statute of
15 limitations for filing a habeas petition under 28 U.S.C. § 2254
16 when a petitioner's attorney failed to satisfy professional
17 standards of care. See 130 S. Ct. at 2563-64. The Supreme
18 Court held that "at least sometimes, professional misconduct ...
19 [could] amount to egregious behavior and create an extraordinary
20 circumstance that warrants equitable tolling." Id. Equitable
21 tolling has been applied when an attorney's misconduct is
22 "sufficiently egregious," i.e., for example when a privately-
23 retained attorney failed to prepare a petition and also kept the
24 petitioner's case file so that it was "unrealistic" to expect
25 the petitioner to file pro se. See Porter, 620 F.3d at 959-60;
26 Spitsyn, 345 F.3d at 800-01. See also Downs v. McNeil, 520 F.3d
27 1311, 1325 (11th Cir. 2008).

1 The Ninth Circuit Court of Appeals has held that a
2 petitioner is entitled to tolling of the statute of limitations
3 if they can establish that they are actually innocent of the
4 crimes of conviction. See Lee, 653 F.3d at 934. The petitioner
5 must show "it is more likely than not that no reasonable juror
6 would have convicted him in the light of the new evidence." Id.
7 at 938. Petitioner does not assert that he is actually
8 innocent, accordingly, Petitioner is not entitled to tolling of
9 the statute of limitations based on the theory of actual
10 innocence.

11 Petitioner presents no reply to Respondents' assertion
12 that his habeas petition is barred by the statute of limitations
13 and does not offer the Court any reason why equitable tolling
14 might be warranted. Accordingly, the petition may be denied and
15 dismissed for Petitioner's failure to timely file this action.

16 **B. Exhaustion and procedural default**

17 Respondents argue that Petitioner has procedurally
18 defaulted his federal habeas claims in the state courts.

19 The District Court may only grant federal habeas relief
20 on the merits of a claim which has been exhausted in the state
21 courts. See O'Sullivan v. Boerckel, 526 U.S. 838, 842, 119 S.
22 Ct. 1728, 1731 (1999); Coleman v. Thompson, 501 U.S. 722, 729-
23 30, 111 S. Ct. 2546, 2554-55 (1991). To properly exhaust a
24 federal habeas claim, the petitioner must afford the state the
25 opportunity to rule upon the merits of the claim by "fairly
26 presenting" the claim to the state's "highest" court in a
27 procedurally correct manner. See, e.g., Castille v. Peoples,

1 489 U.S. 346, 351, 109 S. Ct. 1056, 1060 (1989); Rose v.
2 Palmateer, 395 F.3d 1108, 1110 (9th Cir. 2005). The Ninth
3 Circuit Court of Appeals has concluded that, in non-capital
4 cases arising in Arizona, the "highest court" test of the
5 exhaustion requirement is satisfied if the habeas petitioner
6 presented his claim to the Arizona Court of Appeals, either on
7 direct appeal or in a petition for post-conviction relief. See
8 Swoopes v. Sublett, 196 F.3d 1008, 1010 (9th Cir. 1999). See
9 also Crowell v. Knowles, 483 F. Supp. 2d 925, 932 (D. Ariz.
10 2007).

11 To satisfy the "fair presentment" prong of the
12 exhaustion requirement, the petitioner must present "both the
13 operative facts and the legal principles that control each claim
14 to the state judiciary." Wilson v. Briley, 243 F.3d 325, 327
15 (7th Cir. 2001). See also Kelly v. Small, 315 F.3d 1063, 1066
16 (9th Cir. 2003). In Baldwin v. Reese, the Supreme Court
17 reiterated that the purpose of exhaustion is to give the states
18 the opportunity to pass upon and correct alleged constitutional
19 errors. See 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).
20 Therefore, if the petitioner did not present the federal habeas
21 claim to the state court as asserting the violation of a
22 specific federal constitutional right, as opposed to violation
23 of a state law or a state procedural rule, the federal habeas
24 claim was not "fairly presented" to the state court. See, e.g.,
25 id., 541 U.S. at 33, 124 S. Ct. at 1351.

26 A federal habeas petitioner has not exhausted a federal
27 habeas claim if he still has the right to raise the claim "by
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1 any available procedure" in the state courts. 28 U.S.C. §
2 2254(c). Because the exhaustion requirement refers only to
3 remedies still available to the petitioner at the time they file
4 their action for federal habeas relief, it is satisfied if the
5 petitioner is procedurally barred from pursuing their claim in
6 the state courts. See Woodford v. Ngo, 548 U.S. 81, 92-93, 126
7 S. Ct. 2378, 2387 (2006). If it is clear the habeas
8 petitioner's claim is procedurally barred pursuant to state law,
9 the claim is exhausted by virtue of the petitioner's "procedural
10 default" of the claim. See, e.g., id., 548 U.S. at 92, 126 S.
11 Ct. at 2387.

12 Procedural default occurs when a petitioner has never
13 presented a federal habeas claim in state court and is now
14 barred from doing so by the state's procedural rules, including
15 rules regarding waiver and the preclusion of claims. See
16 Castille, 489 U.S. at 351-52, 109 S. Ct. at 1060. Procedural
17 default also occurs when a petitioner did present a claim to the
18 state courts, but the state courts did not address the merits of
19 the claim because the petitioner failed to follow a state
20 procedural rule. See, e.g., Ylst v. Nunnemaker, 501 U.S. 797,
21 802, 111 S. Ct. 2590, 2594-95 (1991); Coleman, 501 U.S. at 727-
22 28, 111 S. Ct. at 2553-57; Szabo v. Walls, 313 F.3d 392, 395
23 (7th Cir. 2002). "If a prisoner has defaulted a state claim by
24 'violating a state procedural rule which would constitute
25 adequate and independent grounds to bar direct review ... he may
26 not raise the claim in federal habeas, absent a showing of cause
27 and prejudice or actual innocence.'" Ellis v. Armenakis, 222

1 F.3d 627, 632 (9th Cir. 2000), quoting Wells v. Maass, 28 F.3d
2 1005, 1008 (9th Cir. 1994).

3 The doctrine of procedural default provides
4 that a federal habeas court may not review
5 constitutional claims when a state court has
6 declined to consider their merits on the
7 basis of an adequate and independent state
8 procedural rule. A state procedural rule is
9 adequate if it is regularly or consistently
10 applied by the state courts and it is
11 independent if it does not depend on a
federal constitutional ruling. Where a state
procedural rule is both adequate and
independent, it will bar consideration of the
merits of claims on habeas review unless the
petitioner demonstrates cause for the default
and prejudice resulting therefrom or that a
failure to consider the claims will result in
a fundamental miscarriage of justice.

12 McNeill v. Polk, 476 F.3d 206, 211 (4th Cir. 2007) (internal
13 citations and quotations omitted).

14 We recognize two types of procedural bars:
15 express and implied. An express procedural
16 bar occurs when the petitioner has presented
17 his claim to the state courts and the state
18 courts have relied on a state procedural rule
19 to deny or dismiss the claim. An implied
procedural bar, on the other hand, occurs
when the petitioner has failed to fairly
present his claims to the highest state court
and would now be barred by a state procedural
rule from doing so.

20 Robinson v. Schriro, 595 F.3d 1086, 1100 (9th Cir. 2010).

21 Petitioner did not "fairly present" any claims to
22 Arizona's "highest court" in his Rule 32 action because, after
23 dismissal of his Rule 32 action by the trial court, Petitioner
24 did not appeal the trial court's dismissal to the Arizona Court
25 of Appeals. Therefore, because the Arizona Rules of Criminal
26 Procedure regarding timeliness, waiver, and the preclusion of
27 claims bar Petitioner from now returning to the state courts to

1 exhaust any unexhausted federal habeas claims, Petitioner has
2 exhausted, but procedurally defaulted, any claim not previously
3 fairly presented to the Arizona Court of Appeals in his direct
4 appeal. See Insyxiengmay v. Morgan, 403 F.3d 657, 665 (9th Cir.
5 2005); Beaty v. Stewart, 303 F.3d 975, 987 (9th Cir. 2002). See
6 also Stewart v. Smith, 536 U.S. 856, 860, 122 S. Ct. 2578, 2581
7 (2002) (holding Arizona's state rules regarding the waiver and
8 procedural default of claims raised in attacks on criminal
9 convictions are adequate and independent state grounds for
10 affirming a conviction and denying federal habeas relief on the
11 grounds of a procedural bar); Ortiz v. Stewart, 149 F.3d 923,
12 931-32 (9th Cir. 1998).

13 Petitioner did not present his federal habeas claims to
14 the Arizona Court of Appeals in his direct appeal. Petitioner
15 did not present his federal habeas claims to the "highest" state
16 trial court in a timely Rule 32 action. As stated supra,
17 Arizona's Rules of Criminal Procedure regarding waiver and the
18 timeliness of claims have been found to be an adequate and
19 independent basis for affirming a petitioner's convictions and
20 sentences and denying federal habeas relief. Accordingly,
21 unless Petitioner can establish cause for and prejudice from his
22 procedural default of his claims in the state courts, the Court
23 should not consider the merits of his claims.

24 Petitioner presents no reply to Respondents' contention
25 that Petitioner did not exhaust his claims in the state courts.
26 Petitioner has not shown cause for nor prejudice arising from
27 his procedural default of his federal habeas claims in the state
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1 courts. Therefore, the Court should not consider the merits of
2 his claims.

3 **III Conclusion**

4 Petitioner did not file his habeas petition within one
5 year of the date his state conviction became final, allowing for
6 the tolling of the statute of limitations during his Rule 32
7 proceedings. Petitioner has not established that he is entitled
8 to equitable tolling of the statute of limitations.
9 Petitioner's habeas claims were not exhausted in the state
10 courts. Petitioner has not established cause for, nor prejudice
11 arising from his default of these claims.

12
13 **IT IS THEREFORE RECOMMENDED that** Mr. Medrano's Petition
14 for Writ of Habeas Corpus be **denied and dismissed with**
15 **prejudice.**

16 This recommendation is not an order that is immediately
17 appealable to the Ninth Circuit Court of Appeals. Any notice of
18 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
19 Procedure, should not be filed until entry of the District
20 Court's judgment.

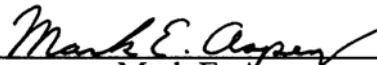
21 Pursuant to Rule 72(b), Federal Rules of Civil
22 Procedure, the parties shall have fourteen (14) days from the
23 date of service of a copy of this recommendation within which to
24 file specific written objections with the Court. Thereafter, the
25 parties have fourteen (14) days within which to file a response
26 to the objections. Pursuant to Rule 7.2, Local Rules of Civil
27 Procedure for the United States District Court for the District

1 of Arizona, objections to the Report and Recommendation may not
2 exceed seventeen (17) pages in length.

3 Failure to timely file objections to any factual or
4 legal determinations of the Magistrate Judge will be considered
5 a waiver of a party's right to de novo appellate consideration
6 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
7 1121 (9th Cir. 2003) (en banc). Failure to timely file
8 objections to any factual or legal determinations of the
9 Magistrate Judge will constitute a waiver of a party's right to
10 appellate review of the findings of fact and conclusions of law
11 in an order or judgment entered pursuant to the recommendation
12 of the Magistrate Judge.

13 Pursuant to 28 U.S.C. foll. § 2254, R. 11, the District
14 Court must "issue or deny a certificate of appealability when it
15 enters a final order adverse to the applicant." The undersigned
16 recommends that, should the Report and Recommendation be adopted
17 and, should Petitioner seek a certificate of appealability, a
18 certificate of appealability should be denied because Petitioner
19 has not made a substantial showing of the denial of a
20 constitutional right as required by 28 U.S.C.A § 2253(c)(2).

21 DATED this 16th day of May, 2013.

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24 Mark E. Asper
United States Magistrate Judge
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